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No. 08-771

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SERGEI MORGORICHEV,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner is a permanent resident alien who was found removable from the U.S. on the basis of his 1993 conviction at trial of an aggravated felony. As relief from removal, Petitioner attempted to apply for a waiver of deportation under former Section 212(c) of the Immigration and Nationality Act (INA). The Immigration Judge held that he was ineligible to apply for relief due to the enactment of Section 440(d) of the Antiterrorism Effective Death Penalty Act of 1996 (AEDPA), which made aliens convicted of aggravated felonies ineligible for § 212(c) relief. Petitioner petitioned the U.S. District Court for the Eastern District of New York for a writ of Habeas Corpus, arguing that the application of § 440(d) to bar him from eligibility for § 212(c) gave the statute an impermissibly retroactive effect. The court granted the petition, and the government appealed. The Court of Appeals for the Second Circuit reversed, and also held that the denial of § 212(c) to Petitioner did not violate equal protection or impermissibly penalize him for exercising his Constitutional right to a jury trial.

The questions presented are:

1. Whether AEDPA § 440(d), as applied to Petitioner to deny him eligibility for § 212(c) relief due to his pre-enactment conviction, has an impermissibly retroactive effect.

2. Whether the denial of § 212(c) relief to Petitioner because he was convicted at trial while such

relief remains available to aliens convicted on a guilty plea violates equal protection.

3. Whether the denial of § 212(c) relief to Petitioner based on the date that the government commenced removal proceedings against him violates equal protection.

4. Whether the denial of § 212(c) relief to Petitioner on the basis that he was convicted at trial impermissibly penalizes him for exercising his Sixth Amendment Right to be tried by a jury.

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OPINIONS BELOW

The Summary Order of the Court of Appeals is reported at *Morgorichev v. Mukasey*, 274 Fed. Appx. 98 (2d Cir. 2008). The denial of rehearing and rehearing *en banc* on August 20, 2008, is unreported (docket no. 00-2406), as are the decisions of the Eastern District of New York, docket no. 98-cv-4809, the Board of Immigration Appeals (BIA), and the Immigration Judge (IJ).

JURISDICTION

The Court of Appeals denied Petitioner's Petition for Review on April 24, 2008, and denied his timely filed Motion for Rehearing and Rehearing *en banc* on August 20, 2008. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(c) (1995):

> **(c) Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this sec-

> tion (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least five years.

Former 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(c) (effective April 24, 1996):

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9) (C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii)

> for which both predicate offenses are covered by section 241(a)(2)(A)(i).

Section 440(d) of the Antiterrorism Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, 1277 (Apr. 24, 1996):

> (d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—
>
> (1) by striking "The first sentence of this" and inserting "This"; and
>
> (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).".

8 C.F.R. §§ 1212.3(g) and (h) (2008), and several versions of the aggravated felony definition at INA § 101(a)(43) (8 U.S.C. § 1101(a)(43) are also relevant to the case and reproduced in the appendix.

STATEMENT OF THE CASE

Petitioner, a Jewish national of the former Soviet Union, was admitted to the U.S. in 1980 as a refugee after he and his family fled the former Soviet Union to escape persecution on the basis of their religion. Petitioner was granted lawful permanent resident status in the U.S. in 1983, retroactive to his admission in 1980. As such, he has been a permanent resident of the U.S. for 27 years. He resides in New York, with his U.S. citizen wife and two U.S. citizen sons.

Petitioner was convicted after trial in the U.S. District Court for the Southern District of New York on April 27, 1993 of conspiring to posses heroin with the intent to distribute. He served 41 months in prison as a result of his conviction.

Petitioner was placed in deportation proceedings on February 21, 1997, when he was served with an Order to Show Cause by the former INS. Petitioner sought relief from deportation under INA § 212(c). However, the IJ held that Petitioner was ineligible to apply for relief due to his conviction of an aggravated felony as the amendments to § 212(c) by AEDPA § 440(d) precluded aliens convicted of an aggravated felony from obtaining § 212(c) relief, and § 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009-546 (September 30, 1996), which repealed § 212(c) altogether (effective April 1, 2007). On May 30, 1997, the IJ ordered Petitioner removed. Petitioner timely appealed to the BIA, which denied his appeal on June 9, 1998.

Petitioner filed a Petition for a Writ of Habeas Corpus in the Eastern District of New York challenging the BIA's order of removal on the grounds that the BIA's holding that § 440(d) and § 304(b) barred Petitioner from applying for relief under § 212(c) on the basis of his pre-enactment conviction of an aggravated felony was an impermissibly retroactive application of the statutes. Jurisdiction in the district court was proper under 28 U.S.C. §§ 2241 et seq., 1331 and 1651, and Article I, Section 9, Cl. 2 of the U.S. Constitution.

On June 20, 2000, Judge Weinstein granted the habeas petition and vacated the BIA's order of removal, adopting the decision of *Pena-Rosario v. Reno*, 83 F. Supp. 2d 349 (E.D.N.Y. 2000), which held that § 440(d) could not be applied retroactively to bar aliens convicted of aggravated felonies prior to its effective date from applying for § 212(c) relief. The government appealed this decision to the Second Circuit. While this appeal was pending, there were several changes in the law regarding the continued availability of § 212(c) to aliens convicted prior to the enactment of § 440(d) and § 304(b).[1]

In *INS v. St. Cyr*, 533 U.S. 289, 326 (2001), this Court held that the repeal of § 212(c) by IIRIRA and the bar to § 212(c) relief for aliens convicted of

[1] The Issue of whether § 304(b) of IIRIRA would bar Petitioner, whose removal proceedings were commenced prior to the effective date of § 304(b), has been resolved and is not at issue here. *See* 8 C.F.R. §§ 1212.3(a), (g); *Matter of Fuentes-Campos*, 21 I & N Dec. 905 (BIA 1997).

aggravated felonies by AEDPA § 440(d) had an impermissibly retroactive effect when applied to bar an alien convicted of an aggravated felony by way of a pre-enactment guilty plea from being eligible for § 212(c) relief. The Court left open the question of whether § 440(d) and § 304(b) had an impermissibly retroactive effect when applied to bar aliens convicted at trial of an aggravated felony prior to their enactment from eligibility for § 212(c) relief.

The Second Circuit, in *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), later held that § 440(d) and § 304(b) do not have a retroactive effect when applied to aliens who were convicted at trial of aggravated felonies prior to their enactment, and § 212(c) is not available to such aliens, even though it remains available to aliens with pre-enactment convictions based on guilty pleas.

In 2005, Congress enacted Section 106(c) of the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, 302 (May 11, 2005), which eliminated the jurisdiction of the District Courts to review habeas actions challenging final orders of removal and requiring the conversion of any pending habeas actions or appeals to petitions for review in the courts of appeals. The government's appeal was converted into a Petition for Review pursuant to 8 U.S.C. § 1252(a)(5), and the case was heard *de novo* by the Second Circuit.[2]

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[2] The roles of the parties in the appeal were ultimately reversed—the government, who was the appellant, became the Respondent in the Petition for Review, and Petitioner became the Petitioner.

On April 24, 2008, the Second Circuit issued a Summary Order denying the Petition for Review. The court applied principles of *stare decisis* and, based on its prior holding in *Rankine*, rejected Petitioners' arguments that § 440(d) had an impermissibly retroactive effect when applied to aliens, such as Petitioner, who were convicted at trial of aggravated felonies prior to the enactment of § 440(d). The court also rejected Petitioner's arguments that the application of § 440(d) to him but not to aliens convicted on a plea or aliens placed in removal proceedings prior to the effective date of § 440(d) violated equal protection and served as an unlawful penalty for having exercised his Constitutional right to a jury trial. Petitioner moved for rehearing and rehearing *en banc*, but his motion was denied on August 20, 2008.

ARGUMENT

I. BACKGROUND.

This case involves an issue of exceptional importance to thousands of permanent resident aliens in this country every year who face deportation as a result of criminal convictions obtained prior to April 24, 1996 or April 1, 1997. Many, if not most, of the affected aliens have U.S. citizen or permanent resident spouses, children and other family members whose lives are dramatically affected by the ability of these aliens to seek relief from removal. The aliens involved, without exception, are long term residents of the U.S., having all

resided in the U.S. since 1997 or earlier, and have both established ties to the U.S. and partially or fully relinquished ties to the lands from which they came.

This Court has often noted the harshness of deportation, even of criminal aliens, and has stated:

> "We have said that deportation is equivalent to banishment or exile. Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If respondent were a citizen, his aggregate sentences of three years and a day would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty and we believe due process of law requires standards for imposing it as definite and certain as those for conviction of crime."

Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting, joined by Black and Frankfurter, J.J.) (footnote omitted). *See also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50, (1950) ("(a) deportation hearing involves issues basic to human

liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.").

In light the harsh consequences of deportation to aliens and their families, Congress has included various forms of relief from removal in our nation's immigration laws. One such form of relief was § 212(c).[3]

The history of § 212(c) is long and convoluted, and continues to evolve more than a decade after it was officially repealed.[4] Prior to 1990, an alien who had been previously admitted as a permanent resident, had maintained an unrelinquished domicile within the U.S. for at least seven years, and who had not left the U.S. under an order of deportation could apply to the attorney general for a waiver of deportation. 8 U.S.C. § 1182(c) 1989. In 1990, § 212(c) was amended to bar aliens who had been convicted of an aggravated felony and served a term of imprisonment of five years or more from eligibility for § 212(c). In 1996, Congress passed § 440(d), which excluded aliens convicted of an aggravated felony or certain drug crimes from eli-

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[3] Importantly, § 212(c) was enacted as part of the original Immigration and Nationality Act of 1952, and was largely unchanged from 1952 until the amendments in 1990 and 1996, and its repeal in 1997. Additionally, a similar form of relief existed from the time of the Immigration Act of 1917. For a complete history, see *INS v. St. Cyr*, 533 U.S. at 294-97.

[4] The full history is too long and convoluted to be recounted in detail here.

gibility for § 212(c). Finally, § 212(c) was repealed effective April 1, 1997 by IIRIRA § 304(b).

Congress first defined an aggravated felony and made conviction of one a ground for deportation with the Anti-Drug Abuse Act of 1988, Pub.L. 100-690 (codified at 8 U.S.C. § 1101(a)(43) (1990). The aggravated felony definition has undergone substantial revisions at least four times since, each substantially broadening the classes of offenses that constitute an aggravated felony. *See INS v. St. Cyr*, 533 U.S. at 296 FN4 (the versions of § 1101(a)(43) that include significant changes have been reproduced in the appendix). The aggravated felony is explicitly retroactive, and "the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996." 8 U.S.C. § 1101(a)(43) (1997).

Thus, aliens residing in this country who were convicted of crimes many years ago, many of whose convictions did not form a ground for deportation at the time they were convicted, have become subject to deportation or removal by action of law at various points between 1988 and the present. Further, because the aggravated felony definition continues to expand, aliens convicted of non-deportable offenses in the past may yet become deportable in the future with additional amendments to 8 U.S.C. § 1101(a)(43).

Most significantly to the instant case, § 440(d) of AEDPA and § 304(b) of IIRIRA removed *any* possible form of relief from removal for most, if not all

aliens convicted of an aggravated felony.[5] *See INS V. St. Cyr*, 533 U.S. at 297.

The availability of § 212(c) relief was restored to aliens who pleaded guilty to an aggravated felony prior to the effective date of AEDPA or IIRIRA by this Court in *INS v. St. Cyr*, 533 U.S. 289, where the Court held that the repeal of § 212(c) had an impermissibly retroactive effect when applied to such aliens. To what extent § 212(c) remains available to other pre-enactment convictions remains an open question, and varies between the courts of appeals. Given the interests at stake, both to the aliens involved and their family members, and for the reasons that follow, the establishment of a bright line rule by this Court is urgently needed.

II. THE DECISION OF THE LOWER COURT CONFLICTS WITH THIS COURT'S ESTABLISHED RETROACTIVITY ANALYSIS.

The decision of the lower court in this case represents a conflict between the Second Circuit's retroactivity analysis, as set forth in *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003), and its progeny, and this Court's retroactivity analysis in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The lower court erroneously held that under *Landgraf*,

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[5] A limited form of relief may be available for certain aliens who would face torture if returned to their country of origin under the United Nations Convention Against Torture, which is not relevant in this or most removal cases.

§ 440(d), as applied to Petitioner, does not have an impermissibly retroactive effect because Petitioner could not show that he detrimentally relied on the continued existence of § 212(c) when he decided to go to trial rather than enter a guilty plea. This reliance requirement, as announced by the lower court in *Rankine*, is in conflict with the holding in *Landgraf*, in which reliance is but one of several possible factors to be considered in determining whether a statute operates retroactively.

Landgraf established a two stage test for evaluating whether a statute has an impermissibly retroactive effect. Noting that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic," *Id.*, at 265, the Court held that it will not give a retroactive effect to a statute without a clear statement by Congress of its intent to make the statute apply retroactively. *Id.*, at 270-73. Thus, the first step of the analysis is to determine if the statute is unambiguously retroactive. If the temporal scope of the statute is ambiguous, the Court proceeds to the second step-determining whether the statute, as applied, has a retroactive effect. *Id.*, at 280. "If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

At issue in the instant case is only the second step of the *Landgraf* analysis. It is well settled that neither AEDPA § 440(d) nor IIRIRA § 304(b) contain an indication that Congress clearly intended them to

apply retroactively. *See INS v. St. Cyr,* 533 U.S. at 320; *St. Cyr v. INS*, 229 F.3d 406, 414 (2d Cir. 2000).

Under *Landgraf*, a statute acts retroactively if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280. The inquiry into whether a statute acts retroactively is guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.*, at 270. Applying this test, this Court held that § 440(d) was impermissibly retroactive when applied to aliens who pleaded guilty to an aggravated felony prior to the enactment of AEDPA because these aliens likely relied on the continued existence of § 212(c) when they entered their pleas with the goal of receiving a sentence of less than five years and thereby preserving their eligibility for § 212(c). *INS v. St. Cyr,* 533 U.S. at 323.[6] Because denying these aliens eligibility for § 212(c) would upset their settled expectations and undermine their reliance interests, the Court found that these aliens fit firmly within the *Landgraf* factors, and the presumption against retroactive effect prohibited the application of § 440(d) to bar them from relief. *Id.*, at 323. However, the Court did not address the issue of whether § 440(d) had a retroactive effect with regard to aliens who were convicted at trial.

[6] The Court's discussion is focused on § 304(b) of IIRIRA, but appears to include § 440(d) of AEDPA, as the five year length of imprisonment is only relevant to preserve eligibility under the pre AEDPA formulation. INS v. St. Cyr, 533 U.S. at 292-94. The Court's rationale is equally applicable to § 440(d).

In *Rankine*, the Second Circuit held that aliens who were convicted at trial could show no reliance on the continued availability of § 212(c). The court determined that an alien could not show that he relied in the existence of § 212(c) at the time he committed his crimes. Nor could he show that by deciding to go to trial he sacrificed anything of value to ensure that he would, in the future, remain eligible for § 212(c). Thus, he had not acted to his detriment in any way in reliance on the continued availability of § 212(c). The court held: "Because those aliens who went to trial prior to the elimination of § 212(c) relief cannot show that they altered their conduct in reliance on the availability of such relief, we hold that IIRIRA's repeal of § 212(c) is not impermissibly retroactive as applied to them." *Rankine*, 319 F.3d at 100.

This requirement- that the alien altered his conduct in reliance on the continued existence of § 212(c), and, as a result, had a settled expectation in its continued availability- is not present in *Landgraf*. While reliance is one basis for finding a statute retroactive, it is not an exclusive or necessary element. While the *Landgraf* analysis is guided by considerations of reliance and settled expectations, it is also guided by principles of notice and fairness.[7] 511 U.S. at 270. Importantly, under *Landgraf*, a statute will be found retroactive

[7] *See also Landgraf*, 511 U.S. at 283 FN 35 ("Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past.").

if, among other things, it would "increase a party's liability for past conduct," *Id.*, at 280, or it "attaches new legal consequences to events completed before its enactment." *Id.*, at 269-70. The Second Circuit in *Rankine* virtually ignored this aspect of in *Landgraf*, and by selecting the decision to plead guilty or go to trial as the relevant event for its retroactivity analysis, completely failed to asses whether the elimination of § 212(c) relief increased an alien's liability for, or attached new legal consequences to, his pre-enactment conviction.[8]

While the test set forth in *Landgraf* is not a formula that can be applied with mathematical precision and mechanical efficiency, it is clear that the question of whether a statute increases liability or creates new legal consequences to conduct occurring before its enactment is *central* to the Court's retroactivity analysis. *See Landgraf*, 511 U.S., at 269, 270, 275, 280, 281, 282-84. Further, the more akin a statute is to a criminal sanction, i.e. one that is punitive in nature or serves as punishment for past acts, the more likely the Court is to find it to operate retroactively. *See Id.*, at 281. The conflict between the decision of the lower court, and its decision in *Rankine*, with *Landgraf* is particularly

[8] The Second Circuit's contention that it is the alien's entry of a guilty plea that renders him deportable is inaccurate. Rankine v. Reno, 319 F.3d at 100. It is the alien's *conviction* that renders him deportable and is the operative fact for the deportation statutes. The plea is only the mechanism of the conviction. See INA § 241(a)(2)(A)(iii), 8 U.S.C. § 1251(a)(2)(A)(iii) (1995) ("any alien who is *convicted* of an aggravated felony at any time after entry is deportable.) (*emphasis added.*)

striking because *Landgraf* is highly analogous to the instant case.

In *Landgraf*, the Court evaluated a statute that imposed the possibility of punitive and compensatory damages on an employer based on the pre-enactment discriminatory conduct of one of its employees toward another. *Id.*, at 282-83. Prior to the statute, which was enacted while the case was pending on appeal, the employer could have been liable for only back pay or lost wages. Under the new statute, the employer could be liable for back pay, lost wages, damages for pain and suffering, and punitive damages. Prior to the statute, the employer was only liable if the plaintiff had been constructively discharged as a result of the discrimination, but subsequent to the statute constructive discharge was not required for the employer to be liable. *Id.*, at 283. The Court held that this was a dramatic increase in potential liability for the employer for events that happened prior to the enactment of the statute.

In the instant case, Petitioner was convicted of a crime prior to the enactment of AEDPA § 440(d). At the time, he met the other requirements of § 212(c), and would have been eligible for 212(c) relief. As this Court has noted, in the years before AEDPA, more than half of all aliens who applied for § 212(c) relief were granted such relief. *INS v. St. Cyr*, 533 U.S. 295-96. Thus, at the time of his conviction, Petitioner faced less than a 50% possibility of being deported for his conviction. On April 24, 1996, with the passage of § 440(d), Petitioner's odds of depor-

tation went from less than half to a total certainty. Like the employer in *Landgraf*, Petitioner's potential liability for events that occurred prior to the enactment of the statute had substantially increased. *See INS v. St. Cyr*, 533 U.S. at 325 ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation.").

In finding that the increase in potential liability (and the new possibility of punitive damages) to the employer for pre-enactment conduct gave the statute an impermissibly retroactive effect, the Court's inquiry in *Landgraf* did not focus on whether the employer had relied in any way on the previous statute. The Court noted that the conduct subjecting the employer to liability had been illegal before and after the enactment of the statute, so the employer (or the employee responsible) had not relied on the statute in deciding whether or not to engage in the discriminatory acts, or in its actions to end the discrimination and discipline the responsible employee. *Id.*, at 283. Yet, the Court found retroactivity without reliance or heightened expectations.

The Court's decision reflects the notion that the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990). The Court's decision demonstrates a particular concern with statutes that penalize pre-enactment conduct.

Although the Ex Post Facto clause applies only to criminal proceedings, the presumption against retroactivity is strongest where a statute would create or increase a penalty for past conduct or is punitive in nature. *See Landgraf*, 511 U.S. at 281. ("The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question."); *Id.*, at 270 ("The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact."); *Id.*, at 284 ("Neither in Bradley itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment."); *Id.*, at 267 FN 20.

AEDPA § 440(d) is exactly the type of statue of which, under *Landgraf*, the presumption against retroactive effect is strongest. Deportation or removal as a consequence of a criminal conviction has a distinctly punitive aspect. *See Fong Haw Tan v. Phelan*, 333 U.S. at 10 ("deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.") (*citation omitted*); *Jordan v. De George*, 341 U.S. at 243 (*Jackson, J., dissenting, joined by Black and Frankfurter, J.J.*) ("Deportation proceedings

technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation."); *Restrepo v. McElroy*, 369 F.3d 627, 636, FN 16 (2d Cir. 2004) ("deportation, like some other kinds of civil sanctions, combines an unmistakable punitive aspect with non-punitive aspects."). Removing any possible form of relief from deportation on the basis of a prior criminal conviction, as § 440(d) does, is also a punitive measure that serves to increase liability for past conduct. See *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) ("The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts"); *INS v. St. Cyr*, 533 U.S. at 325; Landgraf, 511 U.S. at 283-84 ("The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored.") (*emphasis in original*).

The Second Circuit itself has noted that § 440(d) is substantially akin to an ex post facto law. *Restrepo v. McElroy*, 369 F.3d at 632, FN 8 ("We do, however, note that, in the context of criminal sanctions, similar retroactive increases in penalties have been considered to raise serious concerns under the Ex Post Facto Clause, presumably because they violate notice rather than reliance interests.") (*citation omitted*). Oddly, though the Second Circuit has noted the similarity between § 440(d) and ex post facto laws, and has similarly noted the notice interests protected by the prohibition on ex post facto laws, it has thus far failed to

acknowledge that principles of fair notice and the heightened presumption against the retroactive application of statutes that create or increase penalties for past conduct, principles central to the Court's holding in *Landgraf*, are directly and unquestionably applicable to § 440(d), and, in fact, all but require a finding of retroactivity in this case. *See Landgraf*, 511 U.S. at 266-67 ("the Ex Post Facto Clause not only ensures that individuals have fair warning about the effect of criminal statutes, but also restricts governmental power by restraining arbitrary and potentially vindictive legislation."); *Id.*, at 267 FN 20 ("retroactive punitive measures may reflect 'a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons'") *quoting James v. United States*, 366 U.S. 213, 247, n. 3 (1961); *contrast Rankine v. Reno*, 319 F.3d at 102 ("Because we have not found a persuasive argument that the holding in St. Cyr can be extended to cover those aliens who were convicted at trial rather than pursuant to a plea, we conclude that the repeal of § 212(c) relief does not have an impermissibly retroactive effect when applied to petitioners. We agree with our sister circuits that the lack of detrimental reliance on § 212(c) by those aliens who chose to go to trial puts them on different footing than aliens like St. Cyr.").

The Second Circuit's failure to consider factors that are central to the Court's established retroactivity analysis puts its decision in this case, and its

212(c) retroactivity jurisprudence generally, fundamentally at odds with this Court's decision in *Landgraf*. The Second Circuit's misapplication of the Court's retroactivity analysis, coupled with the extreme consequences of the erroneous resolution of the issues involved to Petitioner, his family, and thousands of similarly situated aliens, requires the intervention of this Court.

III. INTERVENTION BY THE COURT IS NEEDED TO RESOLVE A CONFLICT WITHIN THE CIRCUITS.

The continued availability of § 212(c) to aliens convicted of crimes prior to the enactment of AEDPA § 440(d) and IIRIRA § 304(b) remains an issue of contention and has been resolved- and continues to be resolved- in various ways that differ between the various courts of appeals. *See Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 938 (9th Cir. 2007) ("*St. Cyr* has produced considerable disagreement among the courts of appeal concerning whether 'reasonable reliance' on pre-IIRIRA relief from deportation is a required element of a *Landgraf* claim to that relief and, if some form of reliance is required, what form it must take.").

Often, an alien's eligibility for relief from removal or deportation under § 212(c) depends more on geography than on any other factor. The location in which an alien's removal or deportation proceedings were held typically determines which court of appeals has jurisdiction over her case, which determines which aliens remain eligible for § 212(c).

The First Circuit has held that § 212(c) remains categorically available for aliens who pleaded guilty to an aggravated felony prior to AEDPA and served a sentence of five years or less. *Leitao v. Reno*, 311 F.3d 453, 456 (1st Cir. 2002) (noting that an individualized showing of reliance was rejected by *St. Cyr*). However, the court has also held that § 212(c) is not available to aliens convicted at trial because they could not have relied on the continued existence of § 212(c). *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002).

In the Second Circuit, where this case arises, aliens who pleaded guilty to an aggravated felony prior to the enactment of § 440(d) and served a sentence of less than five years in prison remain categorically eligible for § 212(c). *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000); *Rankine v. Reno*, 319 F.3d at 95. Aliens convicted at trial prior to AEDPA remain eligible for § 212(c) if they can demonstrate that they detrimentally relied on the continued availability of § 212(c) in some way, i.e. by foregoing an appeal or delaying the administrative filing of an application for § 212(c). *Restreppo v. McElroy*, 369 F.3d at 637. An alien who cannot show reliance is ineligible for § 212(c). *Id.*

The Third Circuit has held that aliens convicted of an aggravated felony prior to the repeal of § 212(c), whether by trial or by plea, and regardless of any reliance on the continued existence of § 212(c), remain eligible for § 212(c) relief. The court held in *Atkinson v. Attorney General*, 479 F.3d 222, 231 (3d Cir. 2007), that, under *Landgraf*,

the repeal of § 212(c) had an impermissibly retroactive effect when applied to pre-enactment convictions.[9] *Accord Cespedes-Aquino v. AG of the United States*, 498 F.3d 221 (3d Cir. 2007).

The state of the law in the Fourth Circuit remains unclear. In *Chambers v. Reno*, 307 F.3d 284, 292-293 (4th Cir. 2002), the court held that the repeal of § 212(c) was not impermissibly retroactive as applied to an alien convicted at trial because, in deciding to go to trial, the alien had not detrimentally relied in any way on the continued availability of § 212(c). The Court also held that the fact that the alien's conviction was not a deportable offense at the time he was convicted, but only became one after IIRIRA, did not make the repeal of § 212(c) retroactive. *Id.*, at 292. However, a dissenting opinion held that the relevant event for *Landgraf* analysis was the alien's conviction, not the decision to plead or go to trial, and found that, as *Landgraf* did not include a reliance requirement, the repeal of 212(c) had a retroactive effect. *Id.*, at 293-94 (4th Cir. 2002) (*Goodwin, District J., dissenting*).

In *Olatunji v. Ashcroft*, 387 F.3d 383, 388-89 (4th Cir. 2004), the court rejected a reliance requirement in finding the repeal of § 212(c) impermissibly retroactive in respect to an alien who pleaded guilty pre-IIRIRA, and held:

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[9] Though the court referred to IIRIRA, it appears that it was also referring to AEDPA § 440(d) because it referred repeatedly to the fact that the petitioner was convicted of an aggravated felony, a factor only relevant under § 440(d).

> "Believing that these twin requirements would all but turn the presumption against retroactivity on its head, we hold that reliance (whether subjective or objective) is not a requirement of impermissible retroactivity and that the government's notice is insufficient to overcome the impermissibly retroactive effect of IIRIRA on Olatunji's guilty plea."

This holding seems to directly contradict to the holding in *Chambers*. *See Id.*, at 394 ("In sum, the historical presumption against retroactive application of statutes did not require reliance. Neither *Landgraf* nor subsequent Supreme Court authority imposes any such requirement. And we believe that the consideration of reliance is irrelevant to statutory retroactivity analysis."). *But CF Mbea v. Gonzales*, 482 F.3d 276 (4th Cir. 2007) (reaffirming *Chambers* as a matter of *stare decicis).*

The Fifth Circuit follows the Second Circuit's approach in *Restrepo*, holding that the repeal of § 212(c) is retroactive as applied to aliens who were convicted on guilty pleas or those who went to trial but could demonstrate that they relied on the continuing availability of § 212(c). *Carranza-de Salinas v. Gonzales*, 477 F.3d 200, 208 (5th Cir. 2007). However, unlike the Second Circuit, the Fifth Circuit appears to require an alien to make an individualized showing of actual reliance, even if they pleaded guilty. *Id.*, at 205 ("this circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate actual, subjective

reliance on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application. The applicant must show that he detrimentally changed his position in reliance on continued eligibility for § 212(c) relief or that he actively engaged in conduct that reflected an intention to preserve his eligibility for relief under § 212(c).") (*citations and quotations omitted*).

The Sixth Circuit has held that aliens convicted on a plea pre-AEDPA remain categorically eligible for § 212(c) if they would otherwise have been eligible. *Thaqi v. Jenifer*, 377 F.3d 500, 503 (6th Cir. 2004). The court has held that AEDPA is not retroactive as applied to an alien who rejected a plea that would have made him eligible and went to trial instead. *United States v. Zuniga-Guerrero*, 460 F.3d 733, 738-39 (6th Cir. 2006). The Sixth Circuit appears to have a reliance requirement, but it is not clear when that requirement is satisfied for aliens who went to trial. In a somewhat harsh application of the reliance requirement, the court found that AEDPA § 440(d) was not retroactive as applied to an alien who pleaded guilty to a crime after AEDPA but before IIRIRA, which was not an aggravated felony or deportable offense at the time, but became one after IIRIRA. The court held that the alien, even though he was eligible for § 212(c) at the time of his plea, could not have relied on the availability of § 212(c) because, at the time he made his plea, his crime did not render him deportable and in need of relief from removal. *Morgan v. Keisler*, 507 F.3d 1053, 1059 (6th Cir. 2007).

Thus, by pure action of law, the alien simultaneously became an aggravated felon, deportable, and ineligible for any form of relief from removal with the enactment of IIRIRA.

The Seventh Circuit has held that the repeal of § 212(c) is not impermissibly retroactive unless an alien can make an individualized showing that she acted detrimentally in reliance on the continued existence of § 212(c). *U.S. v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008) ("The rule in this circuit remains that relief under § 212(c) is not available to any alien whose removal proceeding began after repeal except to those who affirmatively abandoned rights or admitted guilt in reliance on § 212(c) relief."). This individualized showing is required even of aliens who pleaded guilty to crimes before the enactment of AEDPA and IIRIRA, notwithstanding the Court's categorical holding in *INS v. St Cyr*. However, a concurring opinion in *U.S. v. De Horta Garcia* suggests that the Seventh Circuit is likely to revisit this issue in the future. 519 F.3d at 664-65 (*Rovner, Circuit J, concurring*) (acknowledging that reliance has never been required in any Supreme Court retroactivity case and suggesting that the repeal of § 212(c) is impermissibly retroactive when applied to pre-enactment convictions.). *But cf Esquivel v. Mukasey*, 2008 U.S. App. Lexis 19312 (7th Cir. 2008).

The Eighth Circuit has noted that, under *St. Cyr*, aliens who pleaded guilty to aggravated felonies prior to AEDPA but who otherwise remained eligible for § 212(c) continue to be eligible for § 212(c).

Vue v. Gonzales, 496 F.3d 858, 859 FN1 (8th Cir. 2007). However, the court does not appear to have directly addressed the question in a published holding.

The Ninth Circuit has held that aliens who pleaded guilty to aggravated felonies prior to AEDPA remain eligible for § 212(c), but, "[u]nlike aliens who pleaded guilty, aliens who elected a jury trial cannot plausibly claim that they would have acted any differently if they had known about § 440(d)," and therefore are ineligible for § 212(c). *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) *Cert denied* 539 U.S. 902 (2003). The court has not indicated if any aliens who went to trial could show other reliance interests that would justify the continued availability of § 212(c), but non § 212(c) cases suggest the possibility. *See e.g. Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 942-43 (9th Cir. 2007) (in order to prevail on a *Landgraf* claim, alien must show that it would have been objectively reasonable to rely on the prior law- alien does not need to show actual reliance).

The Tenth Circuit has held that aliens who pleaded guilty prior to AEDPA or can otherwise show objectively reasonable reliance on the prior law in some way, i.e. foregoing appeal, remain eligible for § 212(c). *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006).

The Eleventh Circuit has held that aliens who pleaded guilty to an aggravated felony prior to

AEDPA and served less than five years, or prior to 1990, regardless of sentence, remain eligible for § 212(c) under *St. Cyr*. Aliens convicted at trial do not. *Alexandre v. United States AG*, 452 F.3d 1204, 1207 (11th Cir. 2006). The court appears to find this distinction mandated by *St. Cyr*. *Brooks v. Ashcroft*, 283 F.3d 1268, 1273 (11th Cir. 2002) (prior to AEDPA, "it was irrelevant whether an alien pled guilty or was convicted after trial. . . . The distinction between aliens who plead guilty and those who were convicted after trial is a matter of statutory interpretation by the Supreme Court under *Landgraf* in *St. Cyr*.").

As seen in the preceding summary, there are several variations on the § 212(c) retroactivity theme that have generated different approaches between the circuits, and occasionally within a circuit. Central to all of them is the question of whether *Landgraf* and *St. Cyr* contain any sort of reliance requirement in order for the repeal of § 212(c) to be found to act retroactively.

In addition, the circuits appear to be developing different rules for when an alien was convicted prior to AEDPA for an offense that did not become an aggravated felony until after their conviction. Some have held that these aliens are not eligible for § 212(c) because, whether convicted on a plea or at trial, they could not have relied on § 212(c) at the time because their crimes did not become deportable offenses until later. Others have followed the traditional plea/trial distinction, and many have yet to address the question.

The result is that geographical considerations, completely unrelated to the question at hand, have resulted in largely disparate results among identically situated aliens. Another, equally important result, is that, aside from the Third Circuit, the test for § 212(c) eligibility has become extraordinarily complex, burdensome and unworkable. None of the circuits have addressed the full universe of potential retroactivity questions created by § 440(d) and § 304(b). The interplay between these sections and the continuously expanding and explicitly retroactive aggravated felony definition has all but insured an almost infinite list of possible variations on the theme.

The solution, of course, is a simple one. It is to resort to the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place," *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. at 855, and, as the Third Circuit has done, draw the line for § 212(c) eligibility at the date of an alien's conviction. If, under the law in effect at the time of the conviction, the alien would have been eligible for § 212(c), the alien should continue to be eligible notwithstanding subsequent changes in the immigration laws. This bright-line test would clearly serve the interests of justice, judicial economy, and the efficient administration of the immigration laws.

Because of the injustices that result from the disparate application of the law in the various circuits, and in light of the confusion amongst and

within the circuits that has resulted form *Landgraf* and *St. Cyr.*, intervention from this Court is urgently needed to resolve the conflict between the circuits.

IV. THIS CASE INVOLVES IMPORTANT CONSTITUTIONAL QUESTIONS.

Petitioner argued below that the application of § 440(d) to bar him from eligibility for § 212(c) relief violates equal protection in two ways. First, the denial of § 212(c) to Petitioner, who was convicted of an aggravated felony at trial, but to allow aliens who pleaded guilty to apply for § 212(c) draws a distinction between classes of aliens that is wholly unrelated to the purposes of § 440(d), § 212(c), or any other provision of immigration law. Second, to deny Petitioner eligibility for § 212(c) based on the fact that the government instituted removal proceedings against him after the effective date of § 440(d), but to allow aliens whose proceedings were initiated by the government prior to the effective date of § 440(d) also draws a distinction between classes of aliens based on irrelevant and fortuitous circumstances that are unrelated to the purpose of the statute.

The guiding principle of equal protection is that similarly situated individuals must receive similar treatment from our government. "Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner." *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976).

> "Under the minimal scrutiny test . . . applicable in this case, distinctions between different classes of persons must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Id., at 272, citing *Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

AEDPA § 440(d) and IIRIRA § 304(b) were enacted as part of a series of comprehensive changes in the immigration laws effected by Congress in 1996. *INS v. St. Cyr*, 533 U.S. at 292. The purpose of § 440(d) and § 304(b) can fairly be said to be to limit or eliminate relief from removal for aliens convicted of certain crimes. In fact, one purpose of both AEDPA and IIRIRA generally can be said to reflect an intention of Congress to facilitate the removal of criminal aliens from our shores.

Relevant to the inquiry here, is also the creation of the aggravated felony definition and the amendment to the INA making the conviction of an aggravated felony a ground for deportation that occurred with the Anti-Drug Abuse Act of 1988, 102 Stat. 4469-4470. As of 1988, an alien convicted of an aggravated felony is deportable from the U.S. It is the *conviction* of the aggravated felony that is the operative fact that triggers deportability. This remains the case today. *See* 8 U.S.C. § 1227(a)(2)(iii).

AEDPA § 440(d) amended § 212(c) to bar aliens "deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)." Though the section itself applies to aliens that are deportable for having "committed" any of the listed offenses, all the listed sections explicitly apply to only aliens *convicted* of specified crimes.[10] Thus, the intent of § 440(d) was to preclude aliens *convicted* of aggravated felonies from eligibility for § 212(c). There is no mention of how the conviction is obtained in § 440(d), § 212(c), or the deportation statutes themselves. The question of whether a conviction was obtained by trial or by plea is wholly irrelevant to the purpose of any of the statutes at hand and does not have "a fair and substantial relation to the object of the legislation." *Francis*, 532 F.2d at 272. It is an irrelevant and fortuitous factor under § 440(d).

The Second Circuit has held that § 440(d) is retroactive as applied to aliens convicted on a plea prior to AEDPA, but it is not retroactive to aliens convicted at trial. While, according to the court's retroactivity analysis, aliens convicted on a plea

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[10] 8 U.S.C. §§ 1251(a)(2)(a)(iii) ("any alien *convicted* of an aggravated felony"), (B) ("Any alien . . . *convicted* of a violation . . . of any law relating to a controlled substance"), (C) ("Any alien . . . *convicted* under any law" relating to stated firearms violations), (D) ("Any alien . . . *convicted (the judgment on such conviction becoming final)* of . . ." various espionage and selective service offenses.) (1995) (*emphasis added*).

and aliens convicted at trial are not similarly situated, such aliens remain similarly situated in regard to the purpose of the *statute* at hand. Though this appears, at first blush, to be somewhat of a bootstrapping argument relating to the court's retroactivity analysis, the argument is, in fact, fully rooted in equal protection rather than retroactivity principles.

The focus of the inquiry, for equal protection purposes, is, and must remain, the relationship between the classification and the purpose of the statute. Because, outside of the context of the court's retroactivity analysis, the distinction between classes of aliens who pleaded guilty and those who were convicted at trial bears no reasonable relationship to any legitimate purpose of the statute, these two groups of aliens may not receive disparate treatment under the statute.

The far clearer question for equal protection purposes is whether the government can deny eligibility for § 212(c) to one class of aliens, but grant eligibility to another class of aliens when the aliens are alike in all respects but the date on which the government commenced their removal or deportation proceedings.

Currently, aliens convicted of an aggravated felony prior to AEDPA who served less than five years in prison, and whose proceedings were commenced prior to the effective date of AEDPA, remain eligible for § 212(c) regardless of the manner of conviction. 8 C.F.R. § 1212.3(g). However, an

alien convicted of an aggravated felony prior to AEDPA who served less than five years in prison, but who is placed in proceedings after the effective date of AEDPA is ineligible for § 212(c).[11] Thus, two aliens, convicted on the same day of the exact same offense, receiving the same sentence, and serving the exact same number of days in jail, may be treated differently under the law on the basis of nothing more than when the government commenced proceedings against them.

We note that the date on which proceedings are commenced is determined differently in the circuits. However, there seem to be only two rules on this matter. Either proceedings commence with the filing of the charging document with the immigration court, *see e.g. Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1120 (9th Cir. 2002). or they commence with the service of the charging document on the alien, *see Wallace v. Reno*, 194 F.3d 279, 287 (1st Cir. 1999). In either situation, the date of commencement of removal proceedings is a factor that is exclusively determined by the government, and is wholly outside of the control of the alien. Significantly, there may be long delays, intentional or otherwise, between the time the charging document is issued, served on the alien, then served on the immigration court.[12]

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[11] Depending of course, on the manner of conviction and the circuit.

[12] The choice of whether or when to commence proceedings is within the discretion of the Attorney General. From our survey of 212(c) case law, it appears that the former INS frequently

Thus, the date that an alien is placed in removal proceedings is an irrelevant and fortuitous factor that lacks a reasonable relationship to a legitimate purpose of the statute. While we acknowledge that a procedural line must be drawn at some point, the mandate that the government treat similarly situated individuals similarly, combined with the severity of the interests at stake for the alien and his family, outweighs the government's interest in line drawing, especially where, as here, the line is drawn in such an arbitrary fashion.

Lastly, the court below rejected Petitioner's argument that denying § 212(c) relief to aliens who went to trial, but not to aliens who pleaded guilty, subjects Petitioner to an unlawful penalty for exercising his Sixth Amendment rights. This holding was erroneous.

Allowing an alien who was convicted of an aggravated felony after entering a guilty plea prior to the enactment of § 440(d) to remain eligible for § 212(c) relief while denying the same eligibility to an alien who is similarly situated in all respects but for the fact that the alien chose to go to trial and attempt to prove his innocence rather than enter a plea is an invidious and unlawful penalty for the exercise of a fundamental constitutional right. Aliens with-

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delayed the service and filing of charging documents of aliens with pre-AEDPA aggravated felony convictions until after the passage of AEDPA and IIRIRA. *See e.g. Restrepo v. McElroy*, 369 F.3d at 638 FN 18 (noting that to initiate proceedings against an alien clearly eligible for relief might be an abuse of prosecutorial discretion and a waste of resources).

in our borders are persons within the meaning of the Constitution and are entitled to its protections. *Reno v. Flores*, 507 U.S. 292, 306 (1993). The right to trial is one of the most fundamental rights of our legal system, and is explicitly protected by the Sixth Amendment. As such, the government may not penalize a person for exercising his right to be tried by a jury and attempt to prove his innocence. *See North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) ("penalizing those who choose to exercise constitutional rights, would be patently unconstitutional.") (*citations omitted*) *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989).

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." *Ex parte Lange*, 85 U.S. 163, 168 (1873). In this case, to deny Petitioner eligibility for § 212(c) punishes him for a second time, on the basis of his decision to exercise his constitutional right, for his criminal conduct- conduct for which he already served several years in prison. This second punishment, the elimination of any possible relief from removal, results not just from Petitioner's criminal activity, but from his choice to exercise his right to trial. Such a penalty is prohibited under our laws. *See e.g. Griffin v. California*, 380 U.S. 609, 614 (1965) (invalidating a state practice of allowing a negative inference to be drawn from a defendant's exercise of his Fifth Amendment right "For comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice, which the Fifth Amend-

ment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."); *North Carolina v. Pearce,* 395 U.S. at 724 ("the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law. A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant.") (*citations omitted*).

Additionally, the application of § 440(d) to bar aliens convicted at trial from any possibility of relief from removal solely because they elected to go to trial has a chilling effect on the exercise of Sixth Amendment rights by aliens accused of crimes, who may feel that they will be later penalized for going to trial instead of pleading guilty. This is an unacceptable result. "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *U.S. v. Jackson*, 390 U.S. 570, 582 (1968). *See Id.*, at 583 ("For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.").

Significantly, as the current scope of § 440(d) is largely a judicial creation, denying aliens who went to trial eligibility for § 212(c) is neither required by

the statute itself nor representative of the intent of Congress. Because this construction of § 440(d) unlawfully and unnecessarily penalizes aliens for exercising a fundamental right, and also creates a chilling effect, the intervention of this Court is required to resolve the Constitutional infirmities within the Second Circuit's current application of § 440(d).

CONCLUSION

In light of the truly substantial interests at stake for thousands of long-term, permanent resident aliens who are, or may become, subject to removal on the basis of pre-AEDPA and IIRIRA convictions; and the equally substantial interests at stake for the U.S. families of those aliens, we respectfully request that the Court grant the Petition in order to resolve the split in the circuits; overturn the lower court's erroneous retroactivity analysis; settle the Constitutional issues involved, and establish a cohesive and workable rule regarding § 212(c), AEDPA, and IIRIRA.

Respectfully submitted,

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On the Petition

On Behalf of Petitioner

November 2008

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF THE COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of August two thousand and eight,

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ORDER No. 00-2406-pr
FILED AUG 20, 2008
[OVAL STAMP]

Sergey Morgorichev,

Petitioner-Appellee,

v.

Michael B. Mukasey,

Respondent-Appellant.

Petitioner-Appellee Sergey Morgorichev having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that

determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ FRANK PEREZ
Frank Perez, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of April, two thousand and eight.

Present: HON. PIERRE N. LEVAL,
HON. GUIDO CALABRESI,
Circuit Judges,
HON. ALAN H. NEVAS,
*District Judge.**

00-2406-pr
FILED APR 24, 2008
[OVAL STAMP]

SERGEY MORGORICHEV,

Petitioner-Appellee,

– v –

MICHAEL B. MUKASEY,[1]

Respondent-Appellant.

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* The Honorable Alan H. Nevas, of the United States District Court for the District of Connecticut, sitting by designation.

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Michael B. Mukasey has been substituted for former Attorney General John Ashcroft as the respondent in this case.

FOR PETITIONER-APPELLEE:

DANIEL B. LUNDY, Barst & Mukamal, LLP, New York, N.Y.

FOR RESPONDENT-APPELLANT:

SCOTT DUNN, Assistant United States Attorney (Varuni Nelson, Dione M. Enea, *of counsel*), *for* Benton J. Campbell, United States Attorney for the Eastern District of New York, Brooklyn, N.Y.

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals ("BIA"), it is hereby **ORDERED, ADJUDGED, AND DECREED** that the petition for review is **DENIED.**

In 1993, Sergey Morgorichev, a lawful permanent resident of the United States, was convicted, following a jury trial, of conspiring to distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. § 846. He was sentenced to sixty-three months' imprisonment, followed by a four-year term of supervised release. In 1997, the Immigration and Naturalization Service ("INS") initiated deportation proceedings against Morgorichev, charging him as an alien who had been convicted of an aggravated felony and of a violation of law relating to a controlled substance. 8 U.S.C. § 1227(a)(2)(A)(iii) & (a)(2)(B)(i). The Immigration

Judge ("IJ") found Morgorichev deportable and ineligible for relief under section 212(c) of the Immigration and Nationality Act ("INA"). The BIA affirmed on June 9, 1998. *In re Morgorichev*, No. A23 371 786 (B.I.A. June 9, 1998), *aff'g*, No. A23 371 786 (Immig. Ct. N.Y. City May 30, 1997).

In 1998, Morgorichev filed a habeas petition in the Eastern District of New York, arguing that the BIA and the IJ erred in retroactively applying the limitations on section 212(c) relief enacted by Congress in 1996.[2] The district court granted the habeas petition on June 20, 2000, and the government appealed. The appeal has been held in abeyance pending the decisions of this Court in *Calcano-Martinez v. INS*, 232 F.3d 328 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001), *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001), as well as in *Rankine v. Reno*, 319 F.3d 93 (2d Cir. 2003). We assume the parties' familiarity with the facts, procedural history, and scope of the issues presented on appeal.

During the pendency of this appeal, Congress passed the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302 (May 11, 2005), "sig-

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[2] In 1996, section 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 1227 (Apr. 24, 1996), limited the availability of 212(c) relief for aliens convicted of aggravated felonies. Later that year, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (Sept. 30, 1996). Section 304(b) of IIRIRA repealed INA section 212(c).

nificantly affect[ing] the procedure for disposing of a habeas petition that . . . challenged a final order of removal." *Wilson v. Gonzales*, 471 F.3d 111, 116 (2d Cir. 2006). We have held that in these cases the appeal is converted to a petition for review brought under 8 U.S.C. § 1252. *Id.* In so doing, we review the underlying deportation order, "vacating as a nullity the district court's decision below." *Moreno-Bravo v. Gonzales*, 463 F.3d 253, 257 (2d Cir. 2006). And, as a petitioner's eligibility for a section 212(c) waiver "is a question of law, unlike the discretionary and unreviewable decision of whether such a waiver ultimately should be granted," our review of the issue is *de novo*. *Blake v. Carbone*, 489 F.3d 88, 98 n.7 (2d Cir. 2007).

The government contends that this case is squarely covered by our decision in *Rankine*, 319 F.3d at 99-100, in which we determined that the congressional elimination of section 212(c) relief is not impermissibly retroactive as applied to those aliens who, after trial, were convicted of aggravated felonies before 1996. We reached this conclusion in the case of Rankine and his co-petitioners on the ground that, unlike aliens who had *pled* guilty to aggravated felonies, these aliens had not relied on the availability of such relief.[3] Morgorichev challenges our rationale in *Rankine* as in

[3] Morgorichev does not contend that he delayed seeking 212(c) relief relying on the continued availability of such relief, an argument that remains open to such litigants post-*Rankine*. *See Restrepo v. McElroy*, 369 F.3d 27, 634-35 (2d Cir. 2004); *see also Walcott v. Chertoff*, 517 F.3d 149, 154-55 (2d Cir. 2008).

conflict with the Supreme Court's retroactivity analysis in *Landgraf v. USI Film Products*, 511 U.S. 244 (1944), and in violation of principles of equal protection.

These arguments are unavailing. The Court's decision in *Rankine* addresses both issues. *See Rankine*, 319 F.3d at 98, 103. And we are bound by *Rankine* "unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*." *In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (quotation marks omitted).

Morgorichev further contends that the regulation implementing the various forms of section 212(c) relief, *see* 8 C.F.R. § 1212.3(g), violates equal protection by determining eligibility for section 212(c) relief for criminals, otherwise similarly situated, based on the timing of the commencement of their deportation proceedings. The regulation, however, is a permissible implementation of Congress's intention in passing the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which, as we have held, was precisely to effectuate this line-drawing. *See Henderson v. INS*, 157 F.3d 106, 130 (2d Cir. 1998). Although Morgorichev argues that the government might have manipulated the timing of proceedings in order to prevent aliens from receiving 212(c) relief, we note that the record does not demonstrate any unreasonable delay in the commencement of Mororichev's deportation proceedings.

We have considered all of Petitioner-Appellee's claims and find them to be without merit. For the foregoing reasons, we VACATE the district court's grant of habeas, and DENY the petition for review.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk of the Court

By: /s/ FRANKLIN PEREZ

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SERGEI MORGORICHEV,

Petitioner,

v.

JANET RENO, Attorney General of the United States; DORIS MEISSNER, Commissioner of the Immigration and Naturalization Service, EDWARD J. MCELROY, New York District Director, Immigration and Naturalization Service; IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

Civil Action No. 98-4809
(Weinstein J.)

AMENDED ORDER AND JUDGMENT

By the Honorable Jack B. Weinstein, Senior District Court Judge, it is ORDERED, ADJUDGED, AND DECREED that:

1. The Order dated March 9, 2000, is hereby vacated.

2. The petition for a writ of habeas corpus is hereby granted pursuant to a Memorandum and

Order dated May 11, 2000, by the Honorable John Gleeson, United States District Judge, in *Pena Rosario v. Reno*, 99-CV-4652; *Vargas v. Reno*, 99-CV-6193; *Robinson v. Reno*, 99-CV-7054; *Trinidad v. Reno*, 99-CV-7114; and *Gieta v. Reno*, 99-CV-7630.

3. Enforcement of this Judgment is stayed pending completion of the appellate process.

4. Petitioner is ordered to surrender into custody of the Immigration and Naturalization Service (INS) upon request of the INS.

5. The Immigration and Naturalization Service (INS) agrees not to deport the Petitioner until judicial review is completed.

SO ORDERED.

Dated: Brooklyn, New York
June 20, 2000

By: /s/ JACK B. WEINSTEIN
JACK B. WEINSTEIN,
UNITED STATES DISTRICT JUDGE

cc: Martin L. Rothstein, Esq.
Barst & Mukamal
2 Park Avenue
New York, New York 10016

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of
Immigration Appeals

Falls Church, Virginia 22041

File: A23 371 786 - Dallas

Date: [STAMP]
JUN 09 1998

In re: SERGEY BORISOVICH MORORICHEV

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Richard A. Finkel, Esquire
Meissner, Kleinberg & Finkel, LLP
275 Madison Avenue
New York, New York 10016-1101

ON BEHALF OF SERVICE:
John L. Allums
General Attorney

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)]-
Convicted of aggravated felony
Sec. 237(a)(2)(B)(i), I&N Act
[8 U.S.C. § 1227(a)(2)(B)(i)]-
Convicted of controlled substance
violation

APPLICATION: Asylum; withholding of deportation

In a decision dated May 30, 1997, the Immigration Judge found the respondent subject to removal as charged, denied the respondent's requests for asylum and for withholding of deportation and ordered him deported from the United States. The respondent has appealed from that decision. The appeal will be dismissed in part and sustained in part.

On appeal the respondent asserts that he is eligible for withholding of deportation but section 241(b)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1253(b)(3)(B) precludes such relief as the respondent was convicted of an aggravated felony and sentenced to 63 months in jail.[1]

On appeal the respondent also contends that the Immigration Judge improperly ordered the Ukraine as the country of deportation. The respondent has submitted correspondence from Consul General of the Ukraine stating that one such as the respondent who obtained permanent residence in another country lost his Ukranian citizenship. We

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[1] On appeal the respondent in abbreviated terms states that the Immigration Judge improperly found him subject to removal under a Notice to Appeal dated April 1, 1997, instead of an Order [to] Show Cause dated October 11, 1996, and contends that he would be eligible for relief from deportation if the Service proceeded under the Order to Show Cause. We will not consider such argument as it was not raised before the Immigration Judge and the respondent has stated such contention only in generalized terms. Moreover we note that the Service is authorized to issue a Notice to Appear in a pending case where an Order to Show Cause was previously issued. *See* section 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

shall therefore amend the Immigration Judge's deportation order to reflect the situation.

ORDER: The appeal is dismissed concerning the respondent's eligibility for relief from removal and the appeal is sustained concerning the country of removal.

FURTHER ORDER: The respondent be deported pursuant to the mandates of section 241(b)(1)(C) of the Immigration and Nationality Act.

/s/ [ILLEGIBLE]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DALLAS, TEXAS

File No. A 23 371 786 30 May, 1997

IN REMOVAL PROCEEDINGS

In the Matter of:

SERGIO BORCHIV MORORICHEV,

Respondent.

CHARGES: Sections 237(a)(2)(A)(iii) and Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended; conviction of an aggravated felony and conviction of a controlled substance offense.

APPLICATIONS: None

ON BEHALF OF THE RESPONDENT:

Lee Salas, Esquire
1715 Avenue K, Suite 203
Plano, Texas 75074

ON BEHALF OF THE SERVICE:

John Allums, Esquire
General Attorney
Dallas, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 31-year-old unmarried male alien, a native of the Union of Soviet Socialist Republic, who is alleged by the Service to be a citizen of Russia. The respondent asserts that he is stateless on the basis of having previously immigrated to the United States. The respondent was admitted to the United States as a refugee, from the former Soviet Union at New York, New York on 11 March, 1980, and thereafter adjusted his status to that of permanent resident in May of 1983, retroactive to his entry date in 1980. On 8 April, 1997 a Notice to Appear was issued charging the respondent with removability under the aforementioned sections of the Immigration and Nationality Act ("Act"). The respondent, through Counsel, admitted the allegations and conceded his removability from the United States. No relief was sought from removal and it appears that none is available. The respondent declined to designate a country for removal and the Court designated Russia as the country for removal in the event that occurred.

On the basis of the respondent's knowing admissions through Counsel, as well as the supporting evidence of record (constituting conviction documents for conspiracy to possess with intent to distribute heroine), the respondent is removal from the United States by the record of legal standard of clear and convincing evidence.

The record should reflect that the respondent sought a change of venue to New York for the dis-

position of this case. On the basis of the overwhelming evidence of his removability and the lack of any relief, either requested or available, the motion was denied on the basis that there was essentially no case to send to New York. The witnesses that are addressed in the respondent's written and oral motion for change of venue are irrelevant in terms of their ability to provide any testimony since there is no opportunity for any further or future proceedings for this respondent. Accordingly, the motion was denied on the basis of demonstrating no good cause show for the grant of such a motion.

It should be pointed out that the respondent's family members have travelled to Dallas, Texas in support of him and have provided testimony relating to his efforts to receive from this Court a bond. And, that a bond was granted and the respondent is currently no longer detained by the Service. Accordingly, as such issues relating to bond may address request for venue, they are now moot and no longer worthy of consideration relating to the venue request.

A brief comment on the issue of relief. Former relief of 212(c) now modified and recodified under the term, cancellation of removal, is not available to those convicted of aggravated felonies as has this been respondent. An aggravated felon is ineligible for asylum by statute. The law suggests and the Board of Immigration Appeals has established that a sentence to confinement for an aggravated felony in excess of five years constitutes a presumptable particular serious offense. Thereby making the respondent ineligible for withholding of

deportation, even if such relief had been sought. With a drug conviction, the respondent is ineligible also for adjustment of status even if those opportunity were available. In sum, it appears Counsel for respondent cannot, in good faith, assert any belief of the respondent's opportunity for relief in these proceedings and accordingly has not done so. The Court agrees with that assertion.

The more troubling issues in this case is to attempt to determine the country for removal. The respondent's father, in a previous proceeding, provided what would appear to be copies of the documents under which the family received their refugee status from the Soviet Union. They, the documents do not constitute formal passports, but rather appear to be internal identification documents, which were frequently all that were provided by the Soviet Union to its citizens of the Jewish faith. The question then becomes how to determine which new nations arising out of the former Soviet Union may be the appropriate nation for removal.

The Government has charged the respondent with citizenship in Russia but provided no documents supporting such a charge. The I-213 demonstrates that the respondent was born in Kiev in the Ukraine, which now is a separate national entity with international recognition.

Counsel for respondent has asserted his belief that the Ukraine will not accept the respondent, in that Ukrainians who immigrated from that nation to the United States under refugee status from the former Soviet Union are not permitted to return to that nation with citizenship status. Without regard

to the ultimate accuracy of the position articulated by the respondent's Counsel, I have changed my previous designation of the country for removal from Russia to the Ukraine. And, we'll issue the ultimate Order in this case, removability to the Ukraine, in light of the fact that the Government has provided no evidence to support his removability to the nation of Russia. As a practical matter and assuming this case reaches appellate finality with an Order of Removal, it will be incumbent upon the Government to effect his removal to the Ukraine or to some other nation, which would take him, which may be consistent with the Order of this Court. The evidence of record, however, suggests that if, indeed, he has citizenship for purposes of removal, it is citizenship attendant to the new nation of the Ukraine.

Accordingly, on the basis of the totality of the evidence of record and the circumstances of this case, the following Order shall be entered.

ORDER

ON THE BASIS of the allegations and charges contained in the charging instrument, the respondent is hereby ordered removed from the United States to the nation of the Ukraine in the absence of any relief available.

D. ANTHONY ROGERS
Immigration Judge

May 30, 1997

STATUTORY AND REGULATORY PROVISIONS

8 C.F.R. § 1212.3(g):

(g) Relief for certain aliens who were in deportation proceedings before April 24, 1996. Section 440(d) of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) shall not apply to any applicant for relief under this section whose deportation proceedings were commenced before the Immigration Court before April 24, 1996.

8 C.F.R. § 1212.3(h):

(h) Availability of section 212(c) relief for aliens who pleaded guilty or nolo contendere to certain crimes. For purposes of this section, the date of the plea agreement will be considered the date the plea agreement was agreed to by the parties. Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial.

(1) Pleas before April 24, 1996. Regardless of whether an alien is in exclusion, deportation, or removal proceedings, an eligible alien may apply for relief under former section 212(c) of the Act, without regard to the amendment made by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, with respect to a conviction if the alien pleaded guilty or nolo contendere and the alien's plea agreement was made before April 24, 1996.

(2) Pleas between April 24, 1996 and April 1, 1997. Regardless of whether an alien is in exclusion, deportation, or removal proceedings, an eligible alien may apply for relief under former section 212(c) of the Act, as amended by section 440(d) of the Antiterrorism and

Effective Death Penalty Act of 1996, with respect to a conviction if the alien pleaded guilty or nolo contendere and the alien's plea agreement was made on or after April 24, 1996, and before April 1, 1997.

(3) Pleas on or after April 1, 1997. Section 212(c) relief is not available with respect to convictions arising from plea agreements made on or after April 1, 1997.

8 U.S.C. § 101(a)(43) (1990):

(43) The term "aggravated felony" means murder, any drug trafficking crime as defined in section 924(c)(2) of Title 18, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States.

8 U.S.C. § 101(a)(43) (1991):

(43) The term "aggravated felony" means murder, any illicit trafficking in any controlled substance (as defined in section 802 of Title 21), including any drug trafficking crime as defined in section 924(c)(2) of Title 18, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, any offense described in section 1956 of Title 18 (relating to laundering of monetary instruments), or any crime of violence (as defined in section 16 of Title 18, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years, or any attempt or conspiracy to commit any such act. Such term applies to offenses described in the previous sentence whether in violation of Federal or State law and also applies to offenses described in the previous

sentence in violation of foreign law for which the term of imprisonment was completed within the previous 15 years.

8 U.S.C. § 101(a)(43) (1995):

"(43) The term "aggravated felony" means—

(A) murder;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $100,000;

(E) an offense described in—

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for

which the term of imprisonment imposed (regardless of any suspension of imprisonment) is at least 5 years;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations) for which a sentence of 5 years' imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business; or

(ii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588, of Title 18 (relating to peonage, slavery, and involuntary servitude);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18; or

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $200,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $200,000;

(N) an offense described in section 1324(a)(1) of this title (relating to alien smuggling) for the purpose of commercial advantage;

(O) an offense described in section 1546(a) of Title 18 (relating to document fraud) which constitutes trafficking in the documents described in such section for which the term of imprisonment imposed (regardless of any suspicion of such imprisonment) is at least 5 years;

(P) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 15 years or more; and

(Q) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.

8 U.S.C. § 1101(a)(43) (1997):

(43) The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of Title 18 (relating to peonage, slavery, and involuntary servitude);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sab-

otage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first

offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

8 U.S.C. § 1101(a)(43) (2003):

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588 of Title 18 (relating to peonage, slavery, and involuntary servitude);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sab-

otage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first

offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

No. 08-771

In the Supreme Court of the United States

SERGEI MORGORICHEV, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress amended Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which had provided for a discretionary waiver of deportation, by making it unavailable to aliens convicted of aggravated felonies and then by repealing it altogether. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien who was convicted of an aggravated felony after trial and who does not claim to have relied in any way on the potential availability of discretionary relief under Section 212(c).

2. Whether, for purposes of the retroactive availability of relief under former Section 212(c), it violates the equal protection component of the Due Process Clause to distinguish between an alien who is removable on the basis of a conviction that followed a guilty plea and one whose conviction occurred after a jury trial.

3. Whether 8 C.F.R. 1212.3(g) violates the equal protection component of the Due Process Clause by allowing criminal aliens to seek Section 212(c) relief if they were placed in deportation proceedings before they were made ineligible for such relief.

4. Whether it violates the Sixth Amendment right to a jury trial to distinguish, for purposes of the retroactive availability of Section 212(c) relief, between criminal aliens who pleaded guilty and those who went to trial.

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In the Supreme Court of the United States

No. 08-771

SERGEI MORGORICHEV, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-9a) is not published in the *Federal Reporter* but is reprinted in 274 Fed. Appx. 98. The order of the district court (Pet. App. 10a-11a) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. 12a-14a), and the immigration judge (Pet. App. 15a-19a) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 24, 2008. A petition for rehearing was denied on August 20, 2008 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of aggravated felonies. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant to this case, includes a drug-trafficking crime). See 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3); see also *St. Cyr*, 533 U.S. at 297.

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326. In particular, the Court in *St. Cyr* explained

that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving § 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the *St. Cyr* decision. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it had "determined to retain the distinction between ineligible aliens who were convicted after criminal trials, and [potentially eligible aliens] convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

The 2004 regulations also retained a previously adopted regulation, which had—following decisions of the majority of the courts of appeal—allowed aliens to apply for Section 212(c) relief without regard to the limitations imposed by AEDPA § 440(d), as long as their "deportation proceedings were commenced before the Immigration Court before April 24, 1996," AEDPA's date of enactment. 8 C.F.R. 1212.3(g); see also 69 Fed. Reg. at 57,832; *Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996*, 66 Fed. Reg. 6436, 6437-6438 (2001).

2. Petitioner is a native of the former Soviet Union who, pursuant to a 1983 adjustment of status, was deemed admitted to the United States for lawful permanent residence in 1980. Pet. App. 16a. In 1993, a jury found petitioner guilty of conspiring to distribute and possession with intent to distribute heroin, in violation of 21 U.S.C. 846. Pet. App. 5a. Petitioner was sentenced to 63 months of imprisonment to be followed by four years of supervised release. *Ibid.* His conviction and sentence were affirmed on appeal. See *United States* v. *Podlog*, 35 F.3d 699, 705-707 (2d Cir. 1994), cert. denied, 513 U.S. 1135 (1995). With good-time credit, he ultimately served approximately 41 months in prison. C.A. App. 9, 23, 26.

Before petitioner had finished serving his term of imprisonment, the former Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner—issuing an order to show cause in October 1996 and serving it on him in February 1997—alleging that he was deportable as an aggravated felon and drug offender. C.A. App. 30-31; Pet. App. 5a, 12a; see 8 U.S.C. 1251(a)(2)(A)(ii) and (B)(i) (1994). The deportation proceedings were later transformed into removal proceedings by the issuance of a post-IIRIRA Notice to Appear. Pet. App. 13a n.1.

In May 1997, after a hearing, the immigration judge (IJ) found petitioner removable on both grounds charged. Pet. App. 16a-17a. The IJ noted that petitioner had not sought relief from removal but proceeded to conclude that no relief was available anyway. *Id.* at 16a. In particular, the IJ concluded that petitioner was not eligible for relief under former Section 212(c) because he had been convicted of an aggravated felony, and that he was not eligible for withholding of removal because his

aggravated-felony conviction had resulted in a sentence of imprisonment of more than five years. *Id.* at 17a-18a.

Petitioner appealed that decision to the Board of Immigration Appeals (BIA), which, on June 9, 1998, dismissed his appeal concerning eligibility for relief from removal. Pet. App. 12a-14a. It specifically concluded that he was not eligible for withholding of deportation in light of his aggravated-felony conviction. *Id.* at 13a.[1]

3. Petitioner filed a habeas corpus petition in the United States District Court for the Eastern District of New York, contending that the BIA had erred in applying AEDPA and IIRIRA to find him ineligible for Section 212(c) relief on the basis of his 1993 conviction. Pet. App. 6a. The district court granted the habeas petition on June 20, 2000. *Id.* at 10a-11a. It relied (*id.* at 11a) on *Pena-Rosario* v. *Reno*, 83 F. Supp. 2d 349 (E.D.N.Y. 2000), which held that the restrictions in AEDPA and IIRIRA on Section 212(c) relief did not apply to "aliens whose criminal conduct predated those statutes' enactment." *Id.* at 365.

The government appealed the district court's decision to the United States Court of Appeals for the Second Circuit. Pet. App. 6a. While that appeal was pending, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, which generally barred the use of habeas petitions to review orders of removal, but allowed pending habeas petitions to be converted into petitions for review in the courts of appeals. § 106(a) and (c), 119 Stat. 310, 311. The court of appeals thus vacated the district court's decision and treated the

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[1] The BIA sustained petitioner's appeal with regard to the country of removal, Pet. App. 13a-14a—an issue that is unrelated to the questions presented to this Court by the petition for a writ of certiorari.

government's appeal as if petitioner had filed a petition for review of the BIA's order of removal. Pet. App. 7a.

4. The court of appeals denied the petition for review in an unpublished order dated April 24, 2008. Pet. App. 3a-9a. The court held (*id.* at 8a) that it was bound by its decision in *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003), which concluded that "the repeal of § 212(c) relief does not have an impermissibly retroactive effect when applied to petitioners. We agree with our sister circuits that the lack of detrimental reliance on § 212(c) by those aliens who chose to go to trial puts them on different footing than aliens like St. Cyr," *id.* at 102. The court of appeals recognized that petitioner challenged *Rankine* as being in conflict with both the retroactivity analysis in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), and in violation of principles of equal protection. Pet. App. 7a-8a. It explained, however, that *Rankine* had addressed both of these issues. *Id.* at 8a.

The court of appeals also rejected petitioner's argument that 8 C.F.R. 1212.3(g) violates equal protection by distinguishing between criminal aliens on the basis of whether their deportation proceedings commenced before or after AEDPA was enacted. Pet. App. 8a. The court explained that the regulation "is a permissible implementation of Congress's intention in passing [AEDPA], which, as we have held, was precisely to effectuate this line-drawing." *Ibid.* (citing *Henderson* v. *INS*, 157 F.3d 106, 130 (2d Cir. 1998) (holding that AEDPA's restrictions on Section 212(c) relief do not apply to criminal aliens whose immigration proceedings were pending on the date of enactment), cert. denied, 526 U.S. 1004 (1999)). The court rejected the suggestion that "the government might have manipulated the tim-

ing of proceedings in order to prevent aliens from receiving 212(c) relief" and specifically noted that there was no evidence here of "any unreasonable delay in the commencement of [petitioner's] deportation proceedings." *Ibid.* Finally, the court concluded that it had "considered all of [petitioner's] claims and f[ou]nd them to be without merit." *Id.* at 9a.

ARGUMENT

1. Petitioner contends (Pet. 11-21) that the court of appeals' decision that he is unable to seek relief under former Section 212(c)—because he went to trial rather than pleading guilty to an aggravated felony—conflicts with this Court's retroactivity analysis. He also contends (Pet. 21-30) that this Court's intervention is needed to resolve a conflict in the circuits. The unpublished decision of the court of appeals does not warrant further review, because petitioner's arguments lack merit. The courts of appeals have correctly recognized that reliance—either actual or assumed—is a significant factor to be considered for purposes of retroactivity analysis, although it may be given different weight in different circuits. Furthermore, the underlying question involves the retroactive effect of a statutory repeal that occurred more than 12 years ago, and this Court has denied petitions urging a similar extension of *INS* v. *St. Cyr*, 533 U.S. 289 (2001), in a number of prior cases. See, *e.g.*, *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 128 S. Ct. 2051 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124

(2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003).[2]

a. Petitioner's argument (Pet. 11-21) that the decision below conflicts with this Court's retroactivity analysis by considering whether petitioner relied on Section 212(c) before it was repealed lacks merit. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, *reasonable reliance*, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)) (emphasis added).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimina-

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[2] A similar question is presented in the petition for a writ of certiorari in *Cruz-Garcia* v. *Holder*, No. 08-878 (filed Jan. 2, 2009).

tion of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner principally relies (Pet. 17-21) on this Court's decision in *Landgraf*, *supra*. Of course *Landgraf* specifically mentioned "reasonable reliance," 511 U.S. at 270. Moreover, *Landgraf* pre-dates the decision in *St. Cyr*, which specifically addressed the availability of relief under former Section 212(c), as well as this Court's decision in another immigration case, *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), which explicitly discussed *St. Cyr* and confirmed the importance of reliance in its analysis. In *Fernandez-Vargas*, the Court stated that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (internal quotation marks and citations omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Petitioner argues that retroactivity analysis here should focus on the fact that, even if an alien did not rely on Section 212(c), when his eligibility for discretionary relief from deportation is reduced, he suffers "a punitive measure that serves to increase liability for past conduct." Pet. 19. The amendment and later repeal of Section 212(c) in 1996, however, were neither punitive nor

designed to increase liability for past criminal conduct. Rather, they reflected Congress's judgment regarding the character of aliens who should be afforded an opportunity to remain in the United States at the present time *notwithstanding* their past criminal conduct. Moreover, petitioner's characterization of the repeal of Section 212(c) would have applied in *St. Cyr* itself, which means that, under petitioner's view, the "reasoning and analytical approach" in *St. Cyr* were "superfluous by half," and its discussion of reliance "was a wholly unnecessary and gratuitous academic exercise." *Ferguson* v. *United States Att'y Gen.*, No. 08-10806, 2009 WL 824434, at *12 (11th Cir. Mar. 31, 2009).

Thus, the court of appeals did not err in considering reasonable reliance as part of its "commonsense, functional" judgment about retroactivity. *Martin*, 527 U.S. at 357.

b. Petitioner contends (Pet. 21-30) that there is a conflict among the circuits as to the availability of Section 212(c) relief to aliens convicted of crimes prior to the enactment of AEDPA and IIRIRA. The disagreement is quite narrow, however. Nine circuits have declined to extend the holding of *St. Cyr* generally to aliens convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007);[3] *Hernandez-Castillo* v. *Moore*, 436 F.3d 516,

[3] Petitioner calls (Pet. 23) the Fourth Circuit's case law "unclear," because that court's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004), rejected a reliance requirement for retroactivity analysis, which petitioner says "seems to directly contradict" (Pet. 24) the holding in *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002), which found that the

520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *United States* v. *Zuñiga-Guerrero*, 460 F.3d 733, 737-739 (6th Cir. 2006), cert. denied, 549 U.S. 1145 (2007); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); *Ferguson*, 2009 WL 824434, at *13 (11th Cir. 2009). Only the Third Circuit has held that no showing of reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the BIA from precluding Section 212(c) relief. See *Atkinson* v. *Attorney Gen. of the United States*, 479 F.3d 222, 231 (2007). The existence of that one outlier concerning the interpretation of a statutory provision repealed more than 12 years ago does not warrant this Court's review.

Although petitioner stresses (Pet. 28) that the courts of appeals have "generated different approaches" to analyzing the retroactivity of the 1996 amendments to and repeal of Section 212(c), his case would be an inappropriate vehicle for addressing nearly all of the distinctions among those different approaches. As the court of appeals noted (Pet. App. 7a n.3), petitioner does not contend that he could establish reliance by virtue of a deci-

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repeal of Section 212(c) was not impermissibly retroactive as applied to aliens who went to trial. The Fourth Circuit, however, apparently does not perceive such a conflict. Its opinion in *Olatunji* distinguished *Chambers* on the ground that "IIRIRA was not substantively retroactive to Chambers' relevant past conduct" (*i.e.*, "his decision to go to trial"). 387 F.3d at 392. As petitioner acknowledges (Pet. 24), even after *Olatunji*, the Fourth Circuit has continued to hold that "IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

sion to "delay[] seeking 212(c) relief," which could warrant relief in the Second or Fifth Circuits. See *Wilson* v. *Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006); *Carranza-de Salinas* v. *Gonzales*, 477 F.3d 200, 210 (5th Cir. 2007). Nor does petitioner suggest that he could establish some "other reliance interests" or even a form of assumed, "objectively reasonable reliance" (Pet. 27), which might warrant relief in the Ninth or Tenth Circuits. Nor—despite petitioner's repeated references to Congress's amendments to the definition of "aggravated felony" (Pet. 3, 10, 25, 28; Pet. App. 21a-32a)—does his case present any question about whether an alien is precluded from establishing reliance if his offense of conviction "did not become [a] deportable offense[] until later." Pet. 28. Petitioner's own conviction for conspiring to distribute and possession with intent to distribute heroin, in violation of 21 U.S.C. 846, indisputably made him deportable well in advance of his 1993 conviction, and he remains so today. See 8 U.S.C. 1101(a)(43), 1251(a)(4)(B) (1988); 18 U.S.C. 924(c)(2) (1988); 8 U.S.C. 1227(a)(2)(iii); see also Pet. 31. Accordingly, even if the issues petitioner identifies otherwise warranted review, this case would not be a suitable vehicle for their consideration.

2. Petitioner contends (Pet. 30-34) that the court of appeals' decision violates the equal protection component of the Due Process Clause because it distinguishes "between classes of aliens who pleaded guilty and those who were convicted at trial," a distinction he portrays as "wholly irrelevant to the purpose of any of the statutes at hand." Pet. 32, 33.

Petitioner does not suggest that there is any disagreement among the courts of appeals on that question. In fact, one case he cites (Pet. 28) for a different propo-

sition expressly rejected an equal protection claim about IIRIRA's retroactive repeal of Section 212(c) on the ground that there is "a rational basis in differentiating between a defendant who pleads guilty versus a defendant who goes to trial." *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1274 (11th Cir. 2002).

Moreover, the court of appeals correctly rejected petitioner's equal protection argument, because he was not "similarly situated" with aliens the court found to be eligible for Section 212(c) relief. See *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 63 (2001). Petitioner is not similarly situated *vis-à-vis* an alien who surrendered an important legal right by pleading guilty in presumptive reliance upon existing eligibility under the law at the time. As this Court has previously recognized, the "protection of reasonable reliance interests" is sufficient to survive equal protection review even under the heightened scrutiny used for equal protection challenges to gender-based classifications. *Heckler* v. *Mathews*, 465 U.S. 728, 746 (1984). It follows *a fortiori* that reliance can provide the basis for a legitimate distinction in the immigration context, where a more deferential approach prevails. Indeed, petitioner effectively concedes that point by acknowledging (Pet. 33) that his equal protection analysis depends on an evaluation of allegedly disparate treatment "outside of the context of * * * retroactivity analysis."

3. Petitioner calls (Pet. 33) his equal protection challenge to 8 C.F.R. 1212.3(g) a "far clearer" one. He contends (Pet. 33-35) that the regulation violates equal protection by making AEDPA's amendments to the scope of Section 212(c) generally inapplicable to criminal aliens whose deportation proceedings commenced before the April 24, 1996 enactment of AEDPA. Although peti-

tioner concedes that "a procedural line must be drawn at some point" (Pet. 35), he does not specify any line that would be *more* reasonable than one that permits an alien to seek a discretionary waiver of deportation if that waiver would have been available to him when the deportation proceedings began—much less establish that the line the regulation draws is altogether irrational.[4] In fact, as the Department of Justice twice explained in adopting and later retaining the regulation, the line drawn in the regulation reflected the view of several courts of appeals that had rejected Attorney General Reno's application of AEDPA's restrictions even to aliens who were already in deportation proceedings but who had not already been granted final Section 212(c) relief before AEDPA's enactment. See 69 Fed Reg. at 57,832; 66 Fed. Reg. at 6437-6439. Petitioner does not identify any circuit conflict about the regulation's constitutionality, and no further review of the question is warranted.[5]

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[4] Petitioner suggests (Pet. 34) that the date removal proceedings commence is inappropriate because it "is exclusively determined by the government." He also asserts (Pet. 34-35 n.12) that an unspecified "survey of 212(c) case law" may indicate that "the former INS frequently delayed the service and filing of charging documents * * * until after the passage of AEDPA and IIRIRA." But he does not cite any instance involving intentional delays or otherwise refute the court of appeals' express finding (Pet. App. 8a) that there was no evidence of "any unreasonable delay in the commencement of [petitioner's] deportation proceedings"—which were initiated while he was still imprisoned for his aggravated-felony conviction.

[5] Petitioner does "note" (Pet. 34) that the date proceedings commence is determined differently in different circuits. Any distinction, however, between the date an Order to Show Cause or a Notice to Appear was issued and the date on which it was served on the alien is com-

4. Finally, petitioner contends (Pet. 35-38) that the Sixth Amendment right to a jury trial is violated by allowing those who pleaded guilty to apply for Section 212(c) relief while barring relief to those who went to trial. Petitioner identifies no conflict on this question; indeed, he identifies no court that has addressed the question (since the court of appeals in this case evidently did not believe it warranted separate treatment in its opinion rejecting "all of [petitioner's] claims" as being "without merit," Pet. App. 9a).

Petitioner's claim is founded on erroneous assumptions. He argues that barring him from Section 212(c) relief impermissibly "punishes him for a second time" by eliminating "any possible relief from removal" on the basis of "conduct for which he already served several years in prison." Pet. 36. Leaving aside the fact that petitioner served a term of imprisonment for conspiring to distribute heroin and possessing heroin with intent to distribute it—and not for opting to go to trial—it is simply not true that barring him from discretionary withholding of removal operates as a "punishment." As this Court has long explained, "Congress has power to order the deportation of aliens whose presence in the country it deems hurtful," and deportation is not "a punishment," even when it is based on facts that might constitute a crime. *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913); see *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."). Furthermore, even assuming that the unavailability of relief from deporta-

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pletely irrelevant to petitioner's case, in which all of those events occurred after AEDPA's date of enactment.

tion could be seen as a penalty for not pleading guilty, this Court has also explained that the government is constitutionally permitted "to extend a proper degree of leniency in return for guilty pleas." *Corbitt* v. *New Jersey*, 439 U.S. 212, 223 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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